(4)

No. 96-1971

In The

Supreme Court of the United States

October Term, 1997

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,

Petitioners,

versus

REGIONS BANK OF LOUISIANA, WALTER L. BROWN, JR., PERRY S. BROWN, and FOUNTAINBLEAU STORAGE ASSOCIATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

(1) Does this Court's holding in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981) permit removal of a state court controversy involving mortgage rights in real property located in the forum state, solely on the basis that the defendants intended to assert the affirmative defense of claim preclusion based on a prior federal judgment, where the Petitioners in state court did not file the prior federal action and had no conceivable claim that might have been brought in federal court?

(2) May a United States District Court reach a final decision on the merits of a controversy prior to ascertaining whether federal jurisdiction over the controversy exists, and then use that decision on the merits as the sole basis upon which to invoke federal jurisdiction over the controversy?

LIST OF PARTIES

In accordance with Supreme Court Rule 29.6, Petitioners state as follows:

1. The caption of this case contains the names of all Petitioners who are parties.

2. Regions Bank of Louisiana, Respondent herein, is a wholly-owned subsidiary of Regions Financial Corporation.

3. Two individual Respondents, Walter L. Brown, Jr. and Perry S. Brown, are named in the caption of this case.

4. Fountainbleau Storage Associates, Respondent herein, is a Louisiana limited liability company whose principals and related parties and entities include the following:

(1) Bayou Plaza Development L.L.C.
(2) Storage Trust REIT
(3) Michael D. Aufrecht
(4) Burnam Storage Associates
(5) The Burnam Companies
(6) Chris Burnam
(7) Tim Burnam
(8) Roland von Kurnatowski

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PETITIONERS' BRIEF ON THE MERITS

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT,

Petitioners, Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., respectfully pray that the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, entered in this matter on March 13, 1997, be reversed, and an Order of this Court issue, remanding this case to the Civil District Court for the Parish of Orleans, State of Louisiana.

OPINIONS AND JUDGMENTS BELOW

The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered March 13, 1997, is reported at 108 F.3d 576 (5th Cir. 1997). The Slip Opinion of the Circuit Court (Case No. 95-30524) is reprinted in the Joint Appendix to this Brief at pages App. 48 through App. 90. The Order and Reasons of the United States District Court for the Eastern District of Louisiana (Civil Action No. 95-0426), entered April 20, 1995, is reprinted in the Joint Appendix to this Brief at pages App. 38 through App. 47.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the oral argument at the United States Court of Appeals for the Fifth Circuit was entered on March 13, 1997, affirming the Order and

Reasons of the United States District Court for the Eastern District of Louisiana, dated April 20, 1995. A Suggestion of *En Banc* Treatment was denied on April 15, 1997. The Petition for a Writ of Certiorari, timely filed on June 11, 1997, was granted by this Court on September 29, 1997.

STATUTES AND REGULATIONS INVOLVED

This case involves the following provisions of the United States Code:

Title 28 U.S.C. § 1441:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought.

STATEMENT OF THE CASE

I. Basis for federal jurisdiction in the court of first instance

This action was originally filed in the Civil District Court for the Parish of Orleans, State of Louisiana, to seek recognition of a mortgage on real property located in Orleans Parish, and damages for certain property transfers within Orleans Parish abrogating Petitioners' rights under that mortgage. It was removed to the United States District Court for the Eastern District of Louisiana, pursuant to 28 U.S.C. § 1441(b), on the basis of federal question jurisdiction. All named parties are citizens and

residents of the State of Louisiana. The essence of Petitioners' argument to this Court is that there was no basis for removal jurisdiction or for federal question jurisdiction in the District Court. In her dissent from the Opinion of the Court of Appeals, Judge Edith H. Jones succinctly noted the lack of federal jurisdiction:

> This is a state law claim. The only federal element that plaintiffs could have pleaded is an anticipatory defense . . .

App. 86.

There is no basis on which this claim could have been brought originally in federal court. Both the District Court and the Fifth Circuit constructed a fatally flawed rationale for removal jurisdiction based upon *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981) (hereinafter referred to as "*Moitie*"). Utilizing this rationale, both lower courts employed completely self-referential reasoning in which they first made a final decision on the merits, *i.e.*, that Petitioners' claims were barred by the preclusive effects of a prior federal Bankruptcy Court order, and then, in essence retroactively, based removal jurisdiction in the first instance on that final decision on the merits.[1] The District Court could not have exercised jurisdiction over this action in the first instance, and there was thus no basis for removal jurisdiction.

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[1] Petitioners maintained below, and continue to maintain in this Court, that their claims are not subject to the preclusive effects of the prior federal Bankruptcy Court order. This will be discussed briefly in Section "VI" of the "Argument".

II. Statement of facts

In a complex series of real estate transactions finalized on December 29, 1993, Respondent Regions Bank of Louisiana ("Regions Bank"), which owned certain rights in a parcel of real property located in Orleans Parish, purchased all rights which it did not own from Respondents Walter L. and Perry S. Brown ("the Browns"), and then sold the entire fee interest to Respondent Fountainbleau Storage Associates ("FSA").[2] Record 181-185; 349-385. At the time of the sale to FSA, there was a currently valid $5 million collateral mortgage[3] duly recorded and re-inscribed in the name of Petitioners by the Recorder of Mortgages of Orleans Parish. App. 35-38.

The mortgage encumbered both the underlying leasehold estate (but not the Browns' interest), together with the buildings and other improvements, and was first recorded against the property on May 2, 1984. *Id.*; App. 39. No provision was made in the sale for recognition of Petitioners' mortgage. The various closing documents made no mention of it whatsoever, and Petitioners were given no notice of the transaction.

On April 11, 1994, more than three months after the sale in question, the mortgage was officially re-inscribed on the mortgage rolls of Orleans Parish by the Recorder

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[2] Regions Bank is the successor corporate entity to both First Financial Bank, FSB, and SECOR Bank. In the interest of clarity, Regions Bank and all its various corporate predecessors will be referred to by that single name.

[3] *See* Max Nathan, Jr., *The Collateral Mortgage, Logic and Experience*, 49 La.L.Rev. 39 (1988), for a discussion of the collateral mortgage, a unique Louisiana "hybrid security device, combining the elements of both pledge and mortgage". *Id.* at 39-40.

of Mortgages. App. 35-38. On December 29, 1994, Petitioners brought suit, by ordinary process, in the Civil District Court for the Parish of Orleans seeking recognition of their mortgage and damages for the transfers by Regions Bank in derogation thereof. Record 123-135.

Regions Bank had first come into possession of its rights in the subject property through a bankruptcy proceeding which terminated in 1986. App. 10-34. Prior to that time, the subject property had numerous liens and encumbrances against it, including a $15 million first mortgage in the name of Regions Bank and Petitioners' mortgage, which was at that time a second or junior encumbrance. App. 16, 18 (Nos.: 4, 5, & 29). Between April and August of 1986, the bankruptcy trustee petitioned and was granted approval by the Bankruptcy Court for the Eastern District of Louisiana to sell the subject property, which was owned by the bankrupt estate. App. 10-34. At the bankruptcy sale, Regions used its first mortgage to "credit bid" and bought the buildings and improvements together with the leasehold estate.[4] The underlying land was not subject to the bankruptcy sale and was owned by the Browns until Regions

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[4] The term leasehold estate is not a technically correct description, under the civil law, of Petitioners' mortgage rights herein. In Louisiana, a lease of real property is a personal contract which does not create full rights *in rem*, as at common law. App. 50 n. 2. Nevertheless, because Louisiana statutes do grant certain rights *in rem* to such leases (as well as to mortgages on buildings which are owned separately from the underlying land), such as the protection of the public records doctrine, this distinction is without a difference in these circumstances. *Id. See also*, La.Civ.Code Art. 464. Because the term "leasehold estate" has been used throughout this action, including in the opinion of the Court of Appeals, this Brief will continue to employ this term in the interest of continuity.

Bank bought it from them in December, 1993. Record 25-35.

The order of the Bankruptcy Court, dated June 17, 1986, authorizing the sale by the trustee, purported to authorize that the property be sold "free and clear of all liens and encumbrances". App. 12-15. It is undisputed, however, that no adversary proceeding was held pursuant to Fed.R.Bkrtcy.Proc. 7001, as is mandated by the Bankruptcy Code before the existence, validity, or priority of a mortgage such as Petitioners' mortgage may be determined.[5] Record 294-305. It is also undisputed that the bankruptcy proceeding did not comply with any of the several procedures of § 363 of the Bankruptcy Code, and these procedures provide the only method, apart from Rule 7001, in which a mortgage may be removed from property of the bankrupt estate. *Id*. The only proceeding which was held with respect to the trustee's request was a "motion hearing" of a type which has consistently been held to be insufficient to cancel a lien or other encumbrance. Thus, as a matter of law, Regions Bank bought the property "subject to" Petitioners' mortgage.

Regions Bank maintained that Petitioners were barred by *res judicata* from proceeding with their suit, in

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[5] The basic rationale underlying the adversary procedures of Rule 7001 is notice and opportunity to be heard for mortgagees who are to have their substantive property rights affected. In fact, at the time of the trustee's request, there were approximately 60 additional liens or encumbrances on the subject property. App. 15-22. The Record does not disclose whether any of these lienholders received their Constitutionally required "*Mennonite*" notices. By holding only the kind of truncated motion hearing it did, the Bankruptcy Court implicitly undertook to cancel substantive property rights without adequate notice.

light of the order of the Bankruptcy Court, dated June 17, 1986. Record 472-479; App. 12-15. Regions Bank also maintained that the motion hearing in the Bankruptcy Court and the resulting Bankruptcy Court order were effective by themselves to extinguish Petitioners' mortgage, despite the lack of authorization for such a procedure in the Bankruptcy Code. App. *Id*. Nevertheless, no subsequent procedure was ever instituted to enforce the orders of the Bankruptcy Court, and, Petitioners' mortgage still stands on the mortgage rolls of Orleans Parish. Regions Bank has proffered no explanation for this, although a procedure to erase the mortgage has existed throughout.

Regions Bank's own first mortgage was never reinscribed, and it expired under the applicable rule of prescription in September of 1993.[6] It was thus duly removed from the mortgage rolls by the Recorder of Mortgages. Record 313-314; App. 35-38. In fact, Regions Bank's mortgage was actually extinguished by operation of law in 1986, pursuant to the Louisiana doctrine of confusion, when Regions Bank became the holder of both the mortgage and the subject property. Thus, at the time this action was commenced, apart from various liens that were subject to erasure by prescription, Petitioners' mortgage was the only good and valid encumbrance duly recorded against the subject property. *Id*. App. 52-53 & n. 7.

Both the District Court and the Court of Appeals sustained Respondents' affirmative defense of *res judicata*,

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[6] "Prescription" is a civil law term, borrowed from Roman law, which is analogous to the common law concept of statute of limitations. Thus a claim which falls outside the applicable statute of limitations is said to have prescribed.

holding that the order of the Bankruptcy Court, dated August 14, 1986 (App. 23-34), which approved, *ex post facto*, the trustee's sale of the property, was a "final judgment" having preclusive effect. App. 42-43, 68-70 & n. 56. (This August 14th order will be hereinafter referred to as the "Bankruptcy Court order".) Petitioners maintained that *res judicata* or claim preclusion did not apply for two reasons: First, the cause of action sued upon was not the same as that giving rise to the bankruptcy proceeding. The essential facts establishing the cause of action sued upon were the recorded existence of the mortgage – which was affirmatively reinscribed by the Recorder of Mortgages in 1994[7] – and the sale in derogation of the mortgage in 1993, all of which occurred after the entry of the Bankruptcy Court order, and none of which was involved in the bankruptcy proceeding. Record 15-20; 123-135.

Second, Petitioners were not parties to the bankruptcy proceeding. Two Petitioners, Edmond G. Miranne and Edmond G. Miranne, Jr., appeared in the bankruptcy proceeding as creditors of the bankrupt estate, but were never named as parties thereto, and no adversary proceeding was held in which they could have formally contested the cancellation of their mortgage as required by the Bankruptcy Rules. Record 20-27. Even if this were enough to make those two Petitioners parties to that action for purposes of preclusion, the Bankruptcy Court had no power under the Bankruptcy Code to cancel the mortgage without an adversary proceeding, and thus, the

[7] The mortgage note, which the mortgage secured, was duly reinstated by the maker, and prescription thus waived, in favor of Petitioners in 1989 and 1994. Record 138-139.

cancellation of the mortgage was not properly a part of any resulting order or judgment.

The other two Petitioners, Mary Anna Rivet and Minna Ree Winer, were and remain the spouses of the Mirannes, but they did not appear in the bankruptcy proceeding in any capacity and were not represented by counsel. Thus, Rivet and Winer may not rationally be said to have received their constitutionally required *"Mennonite"* notice.[8]

III. Course of proc edings and disposition in the court below.

Suit was commenced on December 29, 1994, in the Civil District Court for the Parish of Orleans. Removal

[8] In order to reach its decision, the Fifth Circuit indulged in both a factual and legal presumption that Rivet's and Winer's husbands were representing the interests of their spouses through the Louisiana community property regime. There was no basis whatsoever in the Record for this presumption. In fact, were Petitioners equally able to reach beyond the Record, they ould show that both of the respective sets of spouses are either parties to a matrimonial or separate property agreement, or are separately managing their individual interests in any and all matrimonial property. With respect to Winer and Miranne, Jr., such an agreement has even been filed, as of record, in both the Orleans Parish mortgage and conveyance records for many years. *See* MOB, 2345, Folio 412, and COB 767, Folio 87 (December 31, 1979). In such cases, the Louisiana community property regime does not even exist. *See* La.Civ.Code Arts. 2328-2329, 2340, 2370, *et seq*. Thus, there was utterly no basis for the Fifth Circuit to presume that the husbands were, *ipso facto*, representing the separate property interests of their wives, and in fact its presumption to that effect, which caused Rivet's and Winer's rights to be cast aside as of no moment, was quite wrong. *See* further discussion on this point at text accompanying n. 16, below.

was effected on February 3, 1995, by counsel for FSA. Petitioners moved to remand, and all Respondents moved immediately for summary judgment. On April 21, 1995, without oral argument, the District Court denied Petitioners' motion to remand and granted Respondents' motions for summary judgment. The District Court's Order and Reasons (hereinafter the "District Court Opinion"), was signed by the Court on April 20, 1995, and entered by the Clerk on April 21, 1995. App. 38-47. The judgment ordering dismissal of the entire action was signed on April 25, 1995, and entered by the Clerk of Court on April 27, 1995. On May 19, 1995, Petitioners filed a timely notice of appeal from both the Order and Reasons and the judgment ordering dismissal.

Briefing in the Court of Appeals was complete on October 19, 1995, and oral argument was held on October 2, 1996. The Court of Appeals affirmed the District Court in a two-to-one panel decision dated March 13, 1997. App. 48-83. Judge Edith H. Jones filed a dissenting opinion. App. 83-90. Petitioners' subsequent Suggestion of *En Banc* Treatment was denied without opinion on April 15, 1997. A Petition for a Writ of *Certiorari* was timely filed on June 11, 1997, and this Court granted *certiorari* on September 29, 1997. App. 91-95.

SUMMARY OF ARGUMENT

There was no basis for either removal jurisdiction or federal subject matter jurisdiction over this action in the District Court. Thus, the decisions of both lower Courts lack any jurisdictional basis and must not be allowed to stand. The sole basis relied upon for removal jurisdiction herein was an idiosyncratic interpretation by both the District Court and the Court of Appeals of footnote 2 of this Court's *Moitie* opinion. The essence of the matter

before this Honorable Court, therefore, is a reevaluation of the oft-quoted *Moitie* footnote.

The lower Courts' interpretation of *Moitie* is directly contrary to three unanimous opinions of this Court decided subsequent to *Moitie*, all of which re-affirmed the traditional limitations on removal jurisdiction which the Courts below seek to circumvent. Therefore, the lower Courts' interpretation of *Moitie* cannot be correct and should not be upheld. The Courts below held that removal jurisdiction may be based upon an affirmative defense, even where the plaintiff had no claim that might have been brought in federal court. This would limit removal jurisdiction only by the imagination of defense counsel in search of some conceivable defense grounded in federal law.

This is not a case of "artful pleading" by Petitioners to keep their claim out of federal court. There is no basis, artful or inartful, on which the Petitioners' claims might have been brought in federal court. No "disguised" federal claim is presented here. The state courts are presumed competent to decide issues of federal law, including the preclusive effects of prior federal judgments, where applicable.

The Courts below reached the merits without first deciding whether federal jurisdiction existed, and then justified their jurisdiction by the decision on the merits. This stands conventional practice on its head, and should not be countenanced by this Court.

In any event, federal jurisdiction cannot be based upon the legitimacy of the *res judicata* defense in this matter. Petitioners' claim in state court was not barred by the preclusive effects of the Bankruptcy Court order because the nucleus of operative fact, constituting the cause of action sued upon, did not arise until after the

entry of that order. In addition, Petitioners were not parties to the earlier proceeding. Any determination of the validity, priority, or extent of Petitioners' mortgage was not properly among the preclusive effects of the Bankruptcy Court order, because the Bankruptcy Court did not provide Petitioners with the essential elements of due process, notice and opportunity to be heard, before it purported to extinguish their substantive property rights.

Petitioners' state court action cannot be viewed as a collateral attack on the Bankruptcy Court order, because that order did nothing, in and of itself, to affect the recordation of Petitioners' mortgage, even if it be assumed, *arguendo*, that the proper procedures were followed in the Bankruptcy Court. Petitioners' mortgage was not erased by the Bankruptcy Court order. The recordation of a mortgage in Louisiana is conclusive proof that the mortgage exists. Only the Parish Recorder of Mortgages may erase a mortgage on land in Louisiana. The Bankruptcy Court did not order, and could not have ordered, the Recorder of Mortgages to erase Petitioners' mortgage. The Recorder of Mortgages was not brought before the Bankruptcy Court, and the Bankruptcy Court possessed no *in rem* jurisdiction over the land.

Louisiana has statutorily decreed that the Recorder of Mortgages *may not* erase a mortgage as the result of a bankruptcy or judicial sale. Louisiana also provides, however, a judicial procedure wherein a proper order, arising out of a bankruptcy proceeding, may be used to procure a State judgment directing the Recorder of Mortgages to erase a mortgage. Respondents evidently chose not to avail themselves of that procedure, for no such procedure was ever implemented and the mortgage was never erased. In essence, Respondents chose not to enforce the Bankruptcy Court order. Respondents' right to invoke the

state procedure to enforce the order has expired under Louisiana law, as well as under federal law.

ARGUMENT

I. The opinion below is directly contrary to controlling precedent of this Court.

Removal jurisdiction over the facts at bar is not supported by a single other reported opinion. The lower Courts' interpretation of the *Moitie* footnote (hereinafter referred to as the "*Rivet* Rule"[9]) also establishes a theoretical basis for removal that is contrary to every other opinion of this Court addressing removal jurisdiction, including three unanimous opinions decided subsequent to *Moitie* itself.[10] Two of these subsequent opinions were written by Justice Brennan, who expressly dissented from the *Moitie* footnote, and all three of them were joined by Chief Justice Rehnquist, the author of *Moitie*.

In *Rivet*, the Fifth Circuit affirmed the District Court's reasoning that an essentially state law cause of action may be removed to federal court if the defendant in state

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[9] The "*Rivet* Rule" may be stated as follows: If a case removed from state court is found by the federal district court (in a final decision on the merits) to be "completely precluded" by a prior federal judgment, then for that reason alone, the federal court has removal jurisdiction, no matter what the nature of the cause of action.

[10] *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989) (hereinafter referred to as "*Oklahoma Tax Commission*"); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (hereinafter referred to as "*Caterpillar*"); and *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (hereinafter referred to as "*Franchise Tax Board*").

court intends to assert the affirmative defense of claim preclusion or *res judicata*, and the federal court finds, in a decision on the merits, that the defense would be effective. Relying on *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995) (hereinafter "*Carpenter*"), the *Rivet* panel reasoned as follows:

> In thus clearly setting forth the rule for this circuit, the *Carpenter* panel concluded by stating that:
>
> "[w]e hold that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law."
>
> . . . we conclude that the district court properly reasoned that *Carpenter*'s holding provides the sole framework for analyzing the jurisdictional issues raised [herein] . . . and just as the district court here found, *Carpenter* controls. Accordingly, if the defendants can show that [Appellant]'s state court suit . . . is in fact barred by the claim preclusive effects of the [prior federal judgment], then the district court's denial of the . . . motion to remand, and its dismissal of the suit for essentially the same reason, must be affirmed.

App. 64-65 (emphasis by the Court; footnote omitted).

The *Rivet* opinion also discusses the "artful pleading" exception to the well-pleaded complaint rule. Again relying on *Carpenter*, the opinion states as follows:

> The common rationale for these jurisprudential exceptions – euphemistically known by the cynically sarcastic sobriquet of the "artful pleading exception" – is that when the plaintiff has available *"no legitimate or viable state cause of action", but only a federal claim,* he may not avoid

> removal by artfully casting the federal suit as one arising under exclusively under state law.

App. 56-57 (emphasis added and footnotes omitted).

According to the *Rivet* Panel, *Carpenter*'s and *Moitie*'s notion that removal jurisdiction is conferred by a state court defendant's assertion of an apparently effective affirmative defense of claim preclusion, is but a "rarer specie [*sic*] of artful pleading". App. 58. By this rationale, the *Rivet* Panel has in essence held that a state court suit to enforce a mortgage on land located in, and between residents of, the forum state, with no other connection to federal law than the presumed affirmative defense, is "essentially federal" in character. App. 58-59, 86.

At the outset, there are at least three points which are absolutely clear under this Court's precedent, and with respect to which the *Rivet* Rule is in direct violation of that precedent.

1. No "artful pleading"

First, this is not a case of "artful pleading". As Judge Jones points out in her dissent:

> . . . what we also do not have in this case, but [which] was essential in *Moitie* and obviously present in *Carpenter*: a conceivable federal claim that could be asserted by the plaintiff. . . . *To say that a plaintiff's claim can be removed to federal court when he has alleged no conceivable federal claim is true mockery of the well-pleaded complaint rule and the artful pleading doctrine.* How can the artful pleading doctrine apply if the plaintiff's claims cannot be recharacterized into an essentially federal claim that has been omitted by artful pleading?

App. 88 (emphasis added and citation omitted).

As this Court has made plain, the artful pleading doctrine does not convert legitimate state claims into

federal ones, but rather applies, where applicable, to reveal a suit's "necessary federal character". *See Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 23, 103 S.Ct. 2841, 2854, 77 L.Ed.2d 420 (1983). To say that a state court suit to enforce a mortgage is "either wholly federal or nothing at all" or that such a plaintiff "necessarily is stating a federal cause of action whether he chooses to articulate it that way or not" is a direct contradiction of *Franchise Tax Board*. *See Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362, 366 (5th Cir. 1995), *quoting*, 14A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3722 (2d ed. 1985).

Perhaps the most basic principle of the law of removal jurisdiction is that an action filed in state court may not be removed to federal court unless that action could have been brought originally in federal court. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 840-841, 109 S.Ct. 1519, 1521, 103 L.Ed.2d 924 (1989). What the artful pleading doctrine does is simply to empower the district court to ascertain that the state court plaintiff has actually brought an action that could have been brought only in federal court, even though the plaintiff has "artfully" disguised the true federal nature of the claim. Because this state law mortgage enforcement action could not conceivably have been brought originally in federal court, it cannot be said that Petitioners have "disguised" the true nature of a federal claim, and there can be no removal jurisdiction on the basis of "artful" pleading. Perhaps the most pointed comment from the recent jurisprudence to this effect is found in *Rains v. Criterion Systems, Inc.*, 80 F.3d 339 (9th Cir. 1996):

> The claim was authorized by state law and no essential federal law was omitted. The artful pleading doctrine does not permit defendants to achieve what they are trying to accomplish here: to rewrite a plaintiff's properly pleaded claim in order to remove it to federal court.

80 F.3d at 344.

2. No removal for affirmative defenses

The second basic point stems from the fact that Fed.R.Civ.P. 8(c) expressly declares claim preclusion or *res judicata* (as well as discharge in bankruptcy) to be an affirmative defense. *See American Casualty Co. v. United Southern Bank*, 950 F.2d 250, 253 (5th Cir. 1992). This Court's precedent is both clear and well-settled: Removal jurisdiction is not conferred where the federal right is to be raised as a defense to a cause of action under state law. *Oklahoma Tax Commission*, 489 U.S. at 840-841, 109 S.Ct. at 1521. This is so even where the determination of the federal right or immunity either is or may be dispositive of the case. *Franchise Tax Board*, 463 U.S. at 13, 103 S.Ct. at 2848; *Caterpillar, Inc. v. Williams*, 482 U.S. at 396-398, 107 S.Ct. at 2431-2433; *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). *See also Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185, 188, 22 S.Ct. 47, 48, 46 L.Ed. 144 (1901) ("jurisdiction is not conferred by allegations that defendant intends to assert a defense based on . . . a law . . . of the United States.") That an affirmative defense does not allow removal is perhaps the second most basic principle of removal jurisdiction. The *Rivet* opinion does not cite a single precedent or present a single argument as to why Rule 8(c)'s clear command should be ignored in this case. As this Court has made clear, the Federal Rules of Civil Procedure, which are "made law by congress supersede[] conflicting [court rules] . . . ". *Henderson v. United States*, ___ U.S. ___, 116 S.Ct. 1638, 1646, 134 L.Ed.2d 880 (1996).

The *Rivet* Rule's violation of these two cardinal principles of removal jurisdiction has been encapsulated by Judge Jones, in dissent, as follows:

> The majority essentially holds that a *conceivable federal claim is not necessary for removal*, as long as there is a federal defense of *res judicata*, based on a federal judgment.

App. 88 (emphasis by Judge Jones).

3. State courts are competent

The third basic point concerns the *Rivet* Panel's apparent rationale for its Rule: to prevent Petitioners from engaging in a "collateral attack" on the earlier Bankruptcy Court order. App. 69-70, 72-79, 81. Quite obviously, Petitioners do not view their cause of action in this light.[11] Nevertheless, even if this were a completely fair characterization of this case, that would still not confer removal jurisdiction. Once again, this Court has made it clear that:

> . . . when a state proceeding presents a federal issue, *even a pre-emption issue*, the proper course is to seek resolution of that issue by the state court. . . . [Appellees] must present their [claim preclusion] argument to the [Louisiana] state courts, *which are presumed competent to resolve federal issues*.

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 108 S.Ct. 1684, 1691, 100 L.Ed.2d 127 (1988) (emphasis added); *Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 518, 75 S.Ct. 452, 456-457, 99 L.Ed.2d 600 (1955).

In short, Respondents' proper course of action was to have presented their affirmative defense based upon

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[11] This will be discussed in Section "VII" of this Brief.

claim preclusion to the Louisiana State Court. Based upon the violation of precedent discussed in this section alone, the *Rivet* Rule should not be allowed to stand.

The *Rivet* Rule allows a District Court to sustain the removal of a case from state court where that case has no essential federal character whatsoever and could not be re-pleaded as a federal claim. Specifically, the direct implication of the *Rivet* Rule is that a suit between citizens of the forum state, to enforce a mortgage on real property located in the forum state, is "essentially federal in character" merely because the defendant intends to assert an affirmative defense based upon a prior federal bankruptcy order, even where the order was never actually enforced so as to have the mortgage in question erased. Not only is the *Rivet* Rule thus a mockery of the "well-pleaded-complaint" rule, but it is also a gross imposition of naked federal authority upon the sovereignty of state courts. *See Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975).

II. An expansive reading of the *Moitie* footnote has been implicitly disavowed by this Court.

The *Rivet* panel found that this case was controlled by the Fifth Circuit's earlier decision in *Carpenter*. The point at issue in *Carpenter* was the interpretation of the famous "enigmatic footnote" in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981). *Carpenter*, 44 F.3d at 368-369, 370-371. If the *Rivet* Rule is a correct interpretation of *Carpenter*, and if *Carpenter*'s interpretation of the *Moitie* footnote is the correct one, then that aspect of *Moitie* has been overruled *sub silentio* by this Court's subsequent decisions, and both *Carpenter* and *Rivet* are in

violation of that subsequent precedent in several particulars, as discussed in the preceding sections.

Moitie was decided in 1981. Less than two years later, in *Franchise Tax Board*, this Court *unanimously* reaffirmed every previously established principle of removal jurisdiction under 28 U.S.C. § 1441(b) without mentioning, citing, or in any way clarifying the controversial footnote. Moreover, Justice Brennan, the author of *Franchise Tax Board*, had expressly dissented from the *Moitie* footnote, and the author of *Moitie*, (then) Justice Rehnquist, joined the later opinion. As demonstrated above, *Carpenter*'s and *Rivet*'s interpretations of the *Moitie* footnote are simply not consistent with the unambiguous principles laid down in *Franchise Tax Board*.

Subsequently, in *Caterpillar* (1987) and *Oklahoma Tax Commission* (1989), both of which were also unanimous decisions, Justice Brennan and a *per curiam* Court gave ringing affirmation of certain specific aspects of removal jurisdiction that are in no way consistent with *Moitie*, *Carpenter*, or the *Rivet* Rule. Most particularly, in *Oklahoma Tax Commission*, this Court held:

> . . . it has long been settled that the existence of a federal [defense] to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense arises under federal law.

489 U.S. at 841, 109 S.Ct. at 1521, *citing*, *Gully v. First National Bank*, 299 U.S. 109, 109 S.Ct. 96, 81 L.Ed. 70 (1936). As noted previously at pages 17-18, this is so even where the determination of the federal right or immunity either is or may be dispositive of the case.

In *Caterpillar*, this Court unanimously suggested that the artful pleading doctrine should be strictly limited to

cases involving complete preemption of the state cause of action. 482 U.S. at 392, 396 & n. 11, 107 S.Ct. at 2430, 2432 & n. 11. And in 1986, also subsequent to *Moitie*, this Court specifically declined to recognize federal question jurisdiction merely because a state cause of action required the interpretation of a federal statute. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 810, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). No one has argued, and no court has decided, that "complete preemption" applies in this case. Such a ruling would mean that the federal Bankruptcy Code has "completely preempted" state laws concerning the recordation of mortgages throughout the entire United States.

These post-*Moitie* precedents have led at least three scholarly commentators to conclude that either the *Moitie* footnote has been overruled, or that it should be treated merely as an aberration. *See* Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273, 303-315 (January, 1993) and Stanley Blumenthal, Jr., *Artful Pleading and Removal Jurisdiction*, 35 UCLA L.Rev. 315, 365 (1987) (arguing that *Moitie*'s ruling on the removal issue should be disregarded). Moreover, as the Ragazzo article points out, allowing removal jurisdiction to turn upon claim preclusion affords the defendant two bites at the apple. If the federal court concludes that claim preclusion does not apply, then the same defendant may re-allege that defense in the state court. The federal determination will have no preclusive effect because the federal court will have used it to conclude only that it did not have subject matter jurisdiction. Ragazzo, *op. cit.* at 311; *see also* Judge Jones's dissent in *Rivet*, App. 89 n. 7.

Similarly, Rona L. Pietrzak, *Comment, Federated Department Stores v. Moitie: A Radical Departure From Traditional Removal Jurisdiction or an Aberration?*, 43

Univ.Pitt.L.Rev. 1165, 1178 (1982), concludes that this Court could not have actually intended to alter the law of removal jurisdiction, since the controversial footnote was so "striking in its cautiousness". If Professor Pietrzak was correct, that fact has certainly not been perceived by lower federal judges. *Rivet* is not only the latest, but also the most extreme example of the extent to which lower federal courts have felt empowered to expand removal jurisdiction by the *Moitie* footnote.

The current situation has led to a veritable quandary in the district courts where they have tried to apply *Moitie* in light of subsequent precedent from this Court. This quandary may perhaps best be seen in two particular district court cases. In *Magic Chef, Inc. v. International Molders Union*, 581 F.Supp. 772, 776 n. 4 (E.D.Tenn. 1983), the Eastern District of Tennessee found that *Moitie*'s value as authority regarding removal jurisdiction was "supersede[d]" by this Court's opinion in *Franchise Tax Board*, which, as noted, was written by Justice Brennan, a vocal dissenter in *Moitie*, and does not cite *Moitie* at all. In *Gold v. Blinder Robinson & Co.*, 580 F.Supp. 50, 53 (S.D.N.Y. 1984), the Southern District of New York found that:

> Although it is perhaps impossible intellectually to reconcile *Moitie* with established law, it seems proper, absent more direct and fuller consideration of the issue by the Court, to view the result as an aberration. . . . "

As recently as August 15th of this year, Chief Judge Posner of the Seventh Circuit articulated most starkly the great void by which *Moitie* is separated from other writings of this Honorable Court, when he said that the footnote " . . . is (very uncharacteristically for its author, Justice, now Chief Justice Rehnquist) based on distrust of state courts . . . ". *In re Brand Name Prescription Drugs Antitrust Litigation*, MDL No. 997, Slip Op. at 26 (7th Cir. August 15, 1997) (Posner, J.). While Petitioners do not embrace Judge Posner's assessment of the intellectual basis of the *Moitie* footnote itself, it is beyond quarrel that many judges who have enlisted the "enigmatic" footnote in aid of their views have indeed manifested a "distrust of state courts" and have viewed as the appropriate remedy a limitless expansion of federal jurisdiction.

Oklahoma Tax Commission, Caterpillar, and *Franchise Tax Board* make it clear that an affirmative defense based on federal law will not support removal jurisdiction. Furthermore, seven years after *Moitie*, in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), this Court held that state court defendants "must present their [affirmative defense] argument to the . . . state courts, *which are presumed competent to resolve federal issues.*" 486 U.S. at 150, 108 S.Ct. at 1691 (emphasis added).

This Honorable Court has long evidenced a respect for the competence and ability of state court judges to deal with federal issues, including preclusion. As Chief Judge Posner indicated, the various interpretations of the *Moitie* footnote, as exemplified by the *Rivet* Rule, evidence an implicit judicial presumption to the contrary and thus should not be allowed to stand. Further, the clear trend of this Court's jurisdictional precedents continues toward a narrowing of federal jurisdiction.

Thus, Petitioners respectfully submit that, if the Courts below have accurately divined the implications of the *Moitie* footnote, then that footnote has been superseded or overruled *sub silentio*, and cannot be used to support removal jurisdiction. Alternatively, if the lower Courts have incorrectly interpreted the *Moitie* footnote, and it was never intended by this Court to sustain such an expansion of removal jurisdiction, then obviously the

reliance upon *Moitie* in this case was misplaced. Indeed, at least two other Courts of Appeals have interpreted footnote 2 more narrowly than the Fifth Circuit and in such a way that removal could not be supported on the facts at bar.

The most narrow reading of the *Moitie* footnote, and the resulting rule that corresponds most closely with the facts of *Moitie* is found in *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2nd Cir.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986). There, the Second Circuit articulates a rule that permits removal under *Moitie only* where: (1) the state court plaintiff has filed a claim "the elements [of which are] virtually identical to those of a claim expressly grounded on federal law"; and (2) the plaintiff "had previously elected to proceed [on that claim] in federal court". 794 F.2d at 760. If the Fifth Circuit had adopted this rule, the instant case could not have been removed.

Petitioners respectfully submit that, if the *Moitie* footnote has not in fact been overruled or superseded, then the Second Circuit's most narrow reading of the footnote should have been adopted herein. Such a ruling would have complied with *Carpenter*'s stated intention to limit the applicability of the footnote strictly to the facts of the *Moitie* case. 44 F.3d at 369. To narrow the *Sarkisian* rule even further, it should also be required, as Judge Jones and the Ninth Circuit would do, that the prior federal proceeding have terminated in a final judgment, that decided a claim under federal law, with preclusive effect against the present state court plaintiff. App. 84 n. 3; *Ultramar American Limited v. Dwelle*, 900 F.2d 1415 (9th Cir. 1990).

Here, however, the doctrinal validity of the *Rivet* Rule is the basic issue before this Court, and its repudiation would be completely determinative of the lack of removal jurisdiction, thus resulting in the remand of this case to state court. The *Moitie* footnote, and the *Rivet* Rule, should not be allowed to continue to confuse and undermine the otherwise clear principles of removal jurisdiction articulated by this Court. Petitioners respectfully submit that the correct reading of this Court's post-*Moitie* precedent is that footnote 2 has either been implicitly clarified, superseded, or overruled *sub silentio*.

III. The opinion below is not supported by precedent in any other reported opinion.

As Judge Jones points out in her dissent, "the majority has cited no case" (and Petitioners have found no case) "where *Moitie* removal has been allowed where the [state court] plaintiff had not [himself] brought a prior suit grounded in federal law". App. 84 n. 3. As noted above, the *Rivet* majority felt that it was bound by the Fifth Circuit's prior ruling in the *Carpenter* case. App. 63-65. Petitioners argued below that much, if not most, of *Carpenter*'s discussion of *Moitie* was *dicta*, since that case actually found that removal jurisdiction did not exist and remanded Mrs. Carpenter's action to the Texas State Court. App. 668-685; 44 F.3d at 370-371. Judge Jones agreed with this analysis of *Carpenter*. App. 87-88. The purpose and effect of *Carpenter*'s treatment of *Moitie* was to limit the application of footnote 2 to the facts of *Moitie*. The *Carpenter* Court said:

> *Moitie* is a *res judicata* case, not a removal case. The decision centered on the Ninth Circuit's creation of a novel exception to the rule of *res*

> *judicata*, an issue the [Supreme] Court was evidently eager to reach. Furthermore, the marginal treatment of the removal issue makes us hesitate to expand *Moitie* beyond its facts, for a broad interpretation would counter principles established long before, and reaffirmed after, footnote 2 was written.

44 F.3d at 369 (footnote omitted).

Obviously, the facts at bar do not square with the facts of *Moitie*. Here, Petitioners did not file the prior federal action relied upon for its preclusive effects (App. 84-85 & n. 3), and they have no "conceivable federal claim" based upon the cause of action as alleged. App. 88. In *Moitie*, plaintiffs had filed and lost the prior antitrust claim in federal court, and had simply refiled the same factual allegations under a state antitrust statute. 452 U.S. at 395-397, 101 S.Ct. at 2426-2427. Again, as Judge Jones put it:

> In every respect, [the *Rivet*] characteristics represent a more complex procedural scenario than did the *Moitie* plaintiff's copycat pleadings in federal and then state court.

App. 88.

Indeed, the very fact that the *Rivet* majority can purport to feel bound by the holdings in *Carpenter* and *Moitie*, and then proceed to fashion a holding so far beyond the facts of either case, is illustrative of the intellectual morass into which the Circuit Courts of Appeals have plunged themselves in attempting to apply an expansive reading of the *Moitie* footnote to the otherwise clear jurisprudence of removal jurisdiction. This morass is well illustrated by the colloquy between the *Rivet* majority (App. 77-79) and Judge Jones in dissent (App. 84-85 & nn. 3, 4, & 5) with respect to the proper analysis of *Moitie* as well as prior precedent from other circuits.

What follows is an analysis of selected Circuit Court cases applying the *Moitie* footnote. When reviewing this analysis, there are three points that should be borne in mind: (1) Not a single case prior to *Rivet* has allowed *Moitie* removal where, as here, the state court plaintiff did not himself file the prior federal action which was relied upon for its preclusive effects. (2) The analytical formulation of every post-*Moitie* case, where removal was allowed on the basis of *Moitie*, is in violation of this Court's precedents with respect to removal jurisdiction in either *Franchise Tax Board*, *Oklahoma Tax Commission*, or *Caterpillar*. (3) Every one of these cases is also in violation of this Court's command in *Chick Kam Choo* that state courts are "presumed competent" to ascertain and apply the preclusive effects of a prior federal judgment. 108 S.Ct. at 1691.

Perhaps the most interesting wrinkle in *Moitie* analysis lies in two early Ninth Circuit cases, the Circuit whence *Moitie* itself arose. First, soon after *Moitie* was decided by this Court, the Ninth Circuit had its first occasion to apply footnote 2 in the context of removal jurisdiction. In *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1427 (9th Cir. 1984), the Court was confronted with facts virtually identical to *Moitie* and held that in order to fall within the meaning of footnote 2, the subsequent state claim must be "merely the same . . . in disguise." Three years later, in *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 106 (1987), the same Court was confronted with facts more akin to those in *Carpenter*, where a single plaintiff filed simultaneous actions in federal and state courts.

The *Sullivan* opinion presaged *Carpenter* and reached the correct result on those facts by ordering remand of

the state action to state court. 813 F.2d at 1377. The analytical problem with *Sullivan*, however, was that in *dicta* the Court went so far as to suggest, in so many words, that *Moitie* removal could be justified on the basis of an affirmative defense if that defense were to be based upon the complete preclusion of the state action by the *res judicata* effects of a prior federal judgment. Relying upon *Salveson*, the Court speculated that:

> A less expansive explanation for *Moitie*'s use of the artful pleading doctrine is that *Moitie* permits removal only if a federal *res judicata* defense is present.

813 F.2d at 1375.[12]

The *Sullivan* case was decided on April 20, 1987. 813 F.2d at 1368. Less that two months later, on June 9, 1987, this Court handed down *Caterpillar*, 482 U.S. at 386, 107

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[12] Interestingly, the *Sullivan* Court goes on to note that its expansive view of *Moitie* is contrary to then-existing Fifth Circuit precedent, as laid down in *Powers v. South Central United Food & Commercial Workers Union*, 719 F.2d 760, 766 & n. 5 (5th Cir. 1983). Twelve years later, when Respondents effected their removal herein, the Fifth Circuit still did not countenance the kind of removal expansively discussed in *Sullivan*, based upon an affirmative defense arising under federal law. *See, e.g., Willy v. Coastal Corp.*, 855 F.2d 1160, 1167-1172 (5th Cir. 1988). Even the *Carpenter* holding, as pointed out by Judge Jones, would not countenance such a removal. It is only the *Carpenter* Panel's speculation, in *dicta*, which seems to adopt the *Sullivan dicta*, that can at all rationally be read to authorize the *Rivet* removal. Yet, when Respondents effected their removal, on Feb. 3, 1995, *Carpenter* had not yet been decided. One wonders what authority Respondents could have been relying upon to justify their removal – the *Sullivan dicta*? For them, the arrival of *Carpenter* a few days after their removal was truly providential, and rescued them from what should have been sanctions pursuant to Fed.R.Civ.P. 11. *See Willy v. Coastal Corp., supra*, 855 F.2d at 1172-1173.

S.Ct. at 2425, in which it was made absolutely clear that a federal affirmative defense will not confer removal jurisdiction. 482 U.S. at 396-398, 107 S.Ct. at 2431-2433. Moreover, the *Caterpillar* opinion, written for a unanimous Court, quoted from Justice Brennan's dissent in *Moitie* itself, where he strongly suggested that the artful pleading doctrine should be confined to "areas of the law pre-empted by federal substantive law". *Id.* at 2432 n. 11, *quoting Moitie*, 452 U.S. at 410 n. 6, 101 S.Ct. 2433-2424 n. 6.

From the foregoing, it would appear obvious that this Court did indeed intentionally eviscerate the *Moitie* footnote, at least insofar as it purports to grant removal jurisdiction on the basis of an affirmative defense grounded on federal law other than complete pre-emption. However, this does not appear to be so obvious among the Courts of Appeals. For example, both *Carpenter* (44 F.3d at 370 n. 12) and *Rivet* (App. 61-62) cite *Sullivan* and take at least a substantial portion of their authority from the *Sullivan dicta* discussed above. Similarly, in 1990, the Ninth Circuit again allowed *Moitie* removal based upon an affirmative defense. *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir. 1990).

The facts of *Ultramar*, however, did at least present an instance where the state court plaintiff had himself filed the prior federal action, as Judge Jones points out. App. 84 n. 3. But as Judge Jones also points out, the *Rivet* "majority implicitly acknowledges that while it is not 'constrain[ed]' from allowing *Moitie* removal where the plaintiff has not brought a prior claim, it is broadening the scope of *Moitie* removal beyond what has been allowed in other circuits." *Id.* As noted, all of the other cases where *Moitie* removal was allowed involved factual

situations where the plaintiff had brought the prior action. Nevertheless, the analysis in most, if not all, of these cases is broad enough to take *Moitie* removal to the limits of *Rivet* and beyond.

In *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754, 760-761 (2nd Cir.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986), for example, the Second Circuit speculated that *Moitie* removal would be permitted in fact patterns similar to *Sullivan* and *Carpenter* where a plaintiff files simultaneous actions in federal and state courts. This analysis is obviously beyond that of both *Sullivan* and *Carpenter*, and leaves the door open to take the analysis even beyond *Rivet* to situations where there is no prior federal judgment. For a collection of cases evidencing the expansive rationales assigned to *Moitie* among the several Circuits, the attention of the Court is respectively directed to footnotes 35 and 36 of the *Rivet* opinion. App. 62, nn. 35 & 36. For a discussion of the very much more limited rationales of the cases upon which the *Moitie* footnote itself relied, the attention of the Court is respectfully directed to footnote 5 of Judge Jones' dissent. App. 85, n. 5. For a comprehensive analysis of this Court's sixty to seventy year trend of limiting and narrowing the jurisdictional access to federal courts in general, the attention of the Court is respectfully directed to Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L.Rev. 927 (1996).

IV. Further development of the *Rivet* Rule will entail an enormous expansion of federal jurisdiction.

It has been discussed above that the next logical step down the path of the *Rivet* Rule would be a judicial formulation, ostensibly based on the *Moitie* footnote, where removal is allowed in a situation where there is *no*

prior federal judgment, but where jurisdiction is based on an affirmative defense that arises under federal law involving a mere prior order of a federal court that was not a final judgment. Judge Jones, writing in *Rivet*, apparently felt that this would happen. In fact, at least one District Court, subsequent to *Rivet*, has already countenanced such a removal, although the decision was reversed by the Court of Appeals.

In *In re Brand Name Prescription Drugs Antitrust Litigation*, MDL No. 997, (7th Cir. August 15, 1997), the Seventh Circuit reversed a removal pursuant to *Moitie*, where the only prior federal ruling was an order denying class certification. A group of plaintiffs had initially filed a class action in federal court and, following denial of certification, had filed the identical action in Alabama State Court, seeking certification under the State class action statute. The defendants removed the case under, *inter alia*, *Moitie* and the "artful pleading" doctrine. *In re Brand Name Prescription Drugs Antitrust Litigation*, MDL No. 997, Slip Op. at 21-24. The District Court effectively agreed with the defendants and denied the class plaintiffs' motion for remand. In reversing the District Court, Chief Judge Posner reasoned as follows:

> There is no federal judgment here. Neither when the [state court] suit was filed nor when the motion to remand was filed was there any ruling by the district court, let alone a judgment, barring the suit on [any federal] grounds. . . . The twist that *Moitie* gave to the doctrine [of removal jurisdiction] . . . especially since it appears only in a footnote, should be narrowly construed in the interest of maintaining comity between the federal government and the states and keeping federal jurisdiction within the limits prescribed by congress.

Id., Slip Op. at 24, 26.

Petitioners submit that the Seventh Circuit reached the correct decision, but the Court felt that the issue was a "close one" because of "persisting uncertainty about . . . the scope of the doctrine of artful pleading after *Moitie*'s footnote . . . ". Slip Op. at 27. Without *Moitie* there would not have been any conceivable basis for removal jurisdiction. And, as noted, the District Court allowed *Moitie* removal in a situation where there was no prior judgment. It is clear from this case that the theory of removal jurisdiction has commenced yet a further slide down the proverbial "slippery slope", just as Judge Jones sensed in her dissent. App. 86-87.

For all the reasons assigned above, this Court should not allow the *Rivet* Rule to stand in contradiction to every other precedent concerning removal jurisdiction. The necessity for this Court to reverse *Rivet* is expressed most pointedly by Judge Jones in dissent:

> Any reader who has followed the majority opinion and this dissent this far ought to appreciate that our dispute, while technical, is not trivial. The principles of limited federal court jurisdiction and the relative clarity of jurisdictional rules are at issue. *Moitie* and *Carpenter* can be read to authorize removal of this state-law-based case *simply because it is subject to a federal preclusion defense*. But to do so, as I have shown, intrudes on the scope of the well-pleaded complaint rule, expanding removal jurisdiction while engendering complexity and uncertainty in the future. I do not believe that such results were intended by the Supreme Court in *Moitie* or by the *Carpenter* panel.

App. 89-90 (emphasis added and footnote omitted).

V. The opinion below makes a final determination on the merits before jurisdiction has been established.

The *Rivet* opinion, as well as the *Carpenter dicta*, does fundamental violence to the most basic analytical framework of all federal subject matter jurisdiction, including removal jurisdiction. A basic principle of subject matter jurisdiction is that the determination of the existence of jurisdiction must be made first, and if jurisdiction does not exist – as it does not in this case – then no further action may be taken that will affect the merits of the claim. *See Simpkins v. District of Columbia Government*, 108 F.3rd 366, 371 (D.C. Cir. 1997) (" . . . the rule is strict that once a court determines that it lacks subject matter jurisdiction, it can proceed no further"); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 221 (2nd Cir. 1963); Wright & Miller, *Federal Practice & Procedure*, § 1350 at 210 & n. 28 (2d ed. 1990). *See also McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 1984, 124 L.Ed.2d 21 (1993).

Moreover, it is well-settled that:

> *Summary Judgment is a judgment on the merits*; it has the same effect as if the case had been tried by the party against whom judgment is rendered and decided against him.

Daigle v. Opelousas Health Care, Inc., 774 F.2d 1344, 1348 (5th Cir. 1985) (Rubin, J.) (emphasis added). *See also Holy Cross College v. Louisiana High School Athletic Ass'n*, 632 F.2d 1287, 1289 (5th Cir. 1980), *quoting Spector v. L. Q. Motor Inns, Inc.*, 517 F.2d 278, 281 (5th Cir. 1975) (A district court's " . . . jurisdictional inquiry is 'limited to observing whether the complaint is drawn to seek recovery under a federal statute . . . ' ").

And, as this Court has held unequivocally:

> Whether the complaint states a cause of action on which relief could be granted is a question of

> law and *just as issues of fact it must be decided after and not before the court has assumed jurisdiction.*

Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946) (emphasis in original). Indeed, *Bell v. Hood*'s admonition that a decision on the merits may be made only "*after and not before* the court has assumed jurisdiction" applies with even stronger force with respect to a motion for summary judgment. *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-231, 110 S.Ct. 596, 607-608, 107 L.Ed.2d 603 (1990); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912, 917 (1951); *Barnett v. Brown* 83 F.3d 1380, 1383 (Fed.Cir. 1996) (" . . . any statutory tribunal must ensure that it has jurisdiction *before* adjudicating the merits") (emphasis by the Court).

The *Rivet* opinion, however, sets up an analytical framework where a final decision on the merits (complete preclusion) is made first – before jurisdiction has been established – and then that final decision on the merits is used as the sole basis for the Court's jurisdiction to reach a final decision on the merits. This analytical framework is completely circular and self-referential. To somewhat mischievously paraphrase the *Rivet* majority's reasoning: the Court has no jurisdiction to decide the merits until it decides the merits, which decision gives it jurisdiction to decide the merits in the first place. This kind of reasoning could justify virtually anything, not to mention the fact that, if this became the norm, substantial discovery in the federal courts would become a regular part of deciding a motion to remand.[13]

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[13] Indeed, in this case, Petitioners filed an Affidavit of Counsel in the District Court, pursuant to Fed.R.Civ.P. 56(f), specifying that counsel anticipated discovery to show good reason why Respondents had been unable to procure cancellation of their mortgage. Moreover, there was "no adequate time for discovery" in this case. Under this Court's precedent, this fact alone should have precluded a grant of summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Yet, neither Counsel's Affidavit, nor the lack of adequate time for discovery, is even mentioned by the Fifth Circuit's opinion below.

This analytical flaw is clear from even a cursory reading of the *Rivet* opinion. The first half of the opinion (App. 48-65) determines that removal jurisdiction will exist *if* a state court action is "completely precluded". But it is not until the second half of the opinion (App. 65-83), *when the Court is considering the merits of the case pursuant to a motion for summary judgment*, that the opinion concludes that the Court does indeed possess jurisdiction *because* the case is "completely precluded". Undeniably, a judicial finding that a cause of action is "completely precluded" by any prior judgment, whether federal or state, is a final determination on the merits and essentially ends the plaintiff's case. The *Rivet* Rule not only permits, but actually *requires* that this finding be made first, prior to any finding of jurisdiction, and then used as the sole basis of jurisdiction.

VI. Federal jurisdiction could not have been based upon a legitimate affirmative defense here, since Petitioners' claims below were not barred by the doctrine of claim preclusion or *res judicata*.

Because of the lack of removal jurisdiction, the substance of Respondents' affirmative defense of claim preclusion or *res judicata* was not properly before the District Court. Even if the *Rivet* Rule, including its self-referential

circle of jurisdictional reasoning, were to be countenanced, the irony is that removal jurisdiction would still have been inappropriate in this case, because the requirements of claim preclusion are not met, and thus Petitioners' claims were not "completely precluded". In the interest of analytical completeness, this point will be discussed briefly hereafter. For a more complete treatment of the doctrine of claim preclusion as applied to the facts at bar, the attention of the Court is respectfully directed to Petitioners' memorandum of law in the District Court. Record 282-294.

There are at least three reasons why the Bankruptcy Court order is not claim-preclusive of Petitioners' claims herein. First, the cause of action sued upon is not the same as the cause of action giving rise to the bankruptcy proceeding, because the two essential elements of the present cause of action did not occur until more than seven years after the Bankruptcy Court order was entered. Second, the Petitioners were not parties to the earlier bankruptcy proceeding in such a way that made them subject to any preclusive effects of the Bankruptcy Court order. Third, because the Bankruptcy Court did not follow the procedures mandated by the Bankruptcy Code for determining the "validity, priority or extent" of a mortgage on property of the debtor, 11 U.S.C. § 363; Fed.R.Bkrtcy.Proc. 7001, the cancellation of the mortgage was not a part of the preclusive effects of the Bankruptcy Court order.[14] *See In re Terrace Chalet Apartments, Ltd.*, 159 B.R. 821, 825 (N.D. Ill. 1993) (holding that a bankruptcy

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[14] The next section will demonstrate that, at a minimum, Respondents chose not to execute or enforce the bankruptcy judgment in such a way as to have the mortgage erased, and that any right they may have had to do so has now expired.

sale *cannot* extinguish a secured party's lien *unless* one of the exceptions of § 363 applies).

As to the first point, there can surely be no doubt that the instant cause of action is not the same as that in the Bankruptcy Court. The Bankruptcy Court order was entered on August 14, 1986. App. 23-34. The cause of action there, for preclusion purposes, was the statutorily defined insolvency of the debtor. This action, on the other hand, was commenced in 1994. The essence of the instant cause of action is the sale of property in 1993 and the recorded existence of the mortgage at the time of the sale. This cause of action did not exist prior to 1993. Moreover, the mortgage itself was formally and officially re-inscribed on the mortgage rolls in 1994, and this constituted a post-1986 official act of the State of Louisiana. La.Civ.Code Arts. 3342-3348, 3386-3396.

It is well-settled that claim preclusion or *res judicata* does not apply to a cause of action that arises out of occurrences subsequent to the earlier judgment. *See Manning v. City of Auburn*, 953 F.2d 1355, 1359-1360 (11th Cir. 1992); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990); *Harkins Amusement Enterprises, Inc. v. Harry Nace Co.*, 890 F.2d 181 (9th Cir. 1989). Moreover, Courts have consistently refused to apply *res judicata* to a cause of action that relies on even one new fact. *See Jackson v. Johns Manville Sales Corp.*, 727 F.2d 506, 516-522 (5th Cir. 1984) (preclusion did not bar a suit for injuries that grew out of the same conduct that was the subject of the earlier action, but which had not "matured" prior to the earlier judgment); *Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 157 n. 11 (5th Cir. 1971); *Intermedics, Inc. v. Ventritex, Inc.*, 775 F.Supp. 1258, 1263 (N.D.Cal. 1991).

Moreover, in the "motion hearing" type of proceeding that was held, the Mirannes were, by definition,

unable to assert and defend their mortgage rights. Thus, they should not now be precluded from asserting those rights. *See D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36, 38 (5th Cir. 1989) ("Essential to the application of the doctrine of *res judicata* is the principle that the . . . claim to be precluded could have and should have been brought in the earlier litigation"); *Browning v. Navarro*, 887 F.2d 553, 558-559 (5th Cir. 1989). *See also Matter of Braniff Airways*, 783 F.2d 1283, 1289 (5th Cir. 1986) (" . . . if reasonable doubt exists as to what was decided in the first action, the doctrine of *res judicata* should not be applied").

As to the second point, none of the four Petitioners should have been held to have been parties to the Bankruptcy Court proceeding for claim preclusion purposes. Even though Petitioners Edmond G. Miranne and Edmond G. Miranne, Jr. appeared as creditors of the bankrupt estate, they cannot be held to have knowingly participated as parties in any proceeding that they knew could have resulted in the cancellation of their mortgage, because there was no adversary proceeding held, pursuant to Bankruptcy Rule 7001, that included adequate notice of the nature of such a proceeding.

Petitioners Rivet and Winer did not appear in the bankruptcy proceeding in any capacity, and were not represented by counsel. In order to include Rivet and Winer in the preclusive effects of the Bankruptcy Court order, the Fifth Circuit indulges in both a factual and legal presumption that Rivet's and Winer's respective husbands were representing the spouses' interests through the Louisiana doctrine of community property. App. 66-67 & nn. 48, 49. This was done without any basis in the Record to support the presumption.

Under Louisiana law, the presumption that a community property regime exists between spouses is defeated by the existence of a matrimonial or separate property agreement. La.Civ.Code Arts. 2328-2329, 2340, 2370, *et seq.* Thus, if such separate property agreements are in place, the spouses are completely separate juridical entities with respect to their respective property holdings. *Id.* at Arts. 2328, Comment (a); 2370 Comment (a). In this circumstance, a husband is as a complete stranger to his wife's property, and could only "speak for her" or bind her by his assertions if he had independent authority to do so, such as a written power of attorney or mandate. *Id.* at Art. 2328, Comment (b); Art. 2371; La.Civ.Code Art. 2997 A.

Thus, *Rivet*'s entire construct regarding the female spouses is grounded on the unarticulated assumption of a fact not in the Record, *i.e.*, that there was no separate property agreement between either of the respective sets of spouses.[15] The existence of such separate property agreements would mean, beyond any doubt, that at least Rivet and Winer did not receive adequate notice of the potential cancellation of their mortgage rights as is constitutionally required. *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798-799, 103 S.Ct. 2706, 2711, 77 L.Ed.2d 180 (1983). The existence of a community property regime was not raised by any party or by the District Court, before it appeared in the Fifth Circuit's opinion. Thus, Petitioners had no opportunity to rebut the presumption of community.

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[15] As a matter of fact, this was quite wrong. For a fuller discussion of the facts these Petitioners would have been able to prove, had they been advised of the existence of an issue in this regard, the attention of this Honorable Court is respectfully directed to note "8", herein.

Finally, because there was no adversary proceeding held in the Bankruptcy Court, and the procedures of § 363 of the Bankruptcy Code were not followed, the cancellation of Petitioners' property rights was not a proper part of the Bankruptcy Court order. The Fifth Circuit itself has consistently ruled that if the procedural rules of court made it impossible to raise a claim, then that claim is not precluded. *Browning v. Navarro*, 887 F.2d 553, 558 (5th Cir. 1989) ("It is black-letter law that a claim is not barred by *res judicata* if it could not have been brought.") Because the Bankruptcy Court did not follow the mandated procedure, all four Petitioners were unable effectively to contest the cancellation of their mortgage within the defective procedure that was followed. *See D-1 Enterprises, Inc. v. Commercial State Bank, supra*, 864 F.2d at 38. Just as was the case in *D-1 Enterprises*, the two Miranne Petitioners were unable adequately to present their claims in the "motion hearing" type of proceeding that was held. 864 F.2d at 38-39. *See also In re Salmanson*, 132 B.R. 547, 550 (Bkrtcy.N.D.Tex. 1991) (holding that the existence of a bankruptcy order did not preclude the subsequent presentation of issues that were not a part of that order).

The principal reason that Rule 7001 mandates an adversary hearing when substantive property rights, other than those of the debtor, are to be adjudicated is so that those property owners may be afforded due process of law. *See, e.g., United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56, 114 S.Ct. 492, 502, 126 L.Ed.2d 490 (1993) ("The purpose of an adversary proceeding is to ensure the requisite neutrality that must inform all governmental decision making.") The foundation of due process is effective notice to the person whose substantive rights are to be affected. *See Mennonite Board of Missions v.*

Adams, 462 U.S. 791, 798-799, 103 S.Ct. 2706, 2711, 77 L.Ed.2d 180 (1983) ("Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending . . . sale.") At a minimum, without such a proceeding, it cannot be said that Petitioners Rivet and Winer received adequate notice of the pending sale of the subject property, within the meaning of *Mennonite*. This Court was clear in *Mennonite* about the kind of notice required:

> Personal service or mailed notice is required. . . . Notice by mail or other means as certain to ensure actual notice is a minimum constitutional requirement to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice . . .

462 U.S. at 799-800, 103 S.Ct. at 2712 (emphasis by the Court). *See also Federal Savings & Loan Ins. Corp. v. Tri-Parish Ventures, Ltd.*, 881 F.2d 181, 182-184 (5th Cir. 1989) (holding, under Louisiana law, that, even though mortgagees received actual notice of executory process, the failure to serve them with "all notices" did not satisfy the requirements of due process).

Finally, the bankruptcy courts, other than in the Eastern District of Louisiana, have consistently held that when a bankruptcy court does not conduct an adversary proceeding to cancel a mortgage, but, as herein, holds only a "motion hearing," then the property is sold "subject to" the mortgage as a matter of law. *See In re Parrish*, 171 B.R. 138, 141 (Bkrtcy.M.D.Fla. 1994); *In re Wing*, 63 B.R. 83, 85 (Bkrtcy.M.D.Fla. 1986).

VII. Petitioners' state court lawsuit does not constitute a collateral attack on a federal judgment.

Because of the lack of removal jurisdiction, Petitioners' mortgage enforcement action, as well as the actual application of the doctrine of claim preclusion, is not properly before this Honorable Court. Nevertheless, because of the Fifth Circuit's notion that this claim is somehow a collateral attack on a federal judgment, Petitioners will briefly address this argument. Contrary to the Fifth Circuit's characterization, Petitioners' state court action to enforce their mortgage does not constitute a collateral attack on the Bankruptcy Court order. In fact, Respondents chose not to enforce, and thus waived, any right they may have had to enforce that order against Petitioners' mortgage. As will be shown, no collateral attack was necessary, because the Bankruptcy Court order, when entered, did not order (and could not have ordered) the actual erasure of the mortgage, and Respondents did not enforce the order so as to accomplish that result.

At the outset, Petitioners' mortgage was not erased by the Bankruptcy Court order. It is well settled that "[t]he Tenth Amendment gives to the State the exclusive right to legislate concerning the lands within her borders . . . " *Sunderland v. United States*, 266 U.S. 226, 227 (1924); *United States v. Fox*, 4 U.S. 315, 320 (1876). It is equally well settled that all federal courts, including most pointedly bankruptcy courts, are courts of limited jurisdiction. *See Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 87, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982). Their jurisdiction is strictly limited by their Congressional grant of authority. *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 116 S.Ct. 494, 497-498, 133 L.Ed.2d 461 (1995). Because of these limitations on its

authority, the Bankruptcy Court could not, and indeed did not purport to, order the State of Louisiana to erase Petitioners' collateral mortgage.[16]

Louisiana is a record notice jurisdiction. *McDuffie v. Walker*, 51 So. 100 (La. 1909). Thus, Respondents and their attorneys are conclusively presumed to have been aware of the existence and recordation of the mortgage at the time of the sale to FSA. *Id.* This also means that the recordation of a mortgage in Louisiana is an official act of the State, La.Civ.Code Arts. 3342-3348, and that the Parish Recorder of Mortgages is an officer of the State. La.Civ.Code Arts. 3386-3396.[17] In Louisiana, as long as a mortgage is recorded and not erased, that mortgage is

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[16] The previous section demonstrated that the Bankruptcy Court order was not effective to extinguish Petitioners' mortgage rights *vis-a-vis* Respondents. This section will assume, *arguendo*, that the Bankruptcy Court order was effective, when entered, as between Petitioners and Respondents. This section will demonstrate, however, that, whatever rights Respondents may have possessed when the order was entered, they waived and forfeited those rights by their implicit choice not to execute the Bankruptcy Court order, or to engage in supplementary proceedings to enforce their rights under that order, for more than eleven years. In a nutshell: They had a judgment. They didn't enforce it. They waited too long. Now, they can't enforce it.

[17] The Articles of the Louisiana Civil Code cited in this section were amended, renumbered, and, in some cases, redesignated as sections of Title 9 of the Louisiana Revised Statutes by Act 631 of 1991 and Act 1132 of 1992, both of which became effective on January 1, 1993. These acts provide that mortgages and privileges created prior to January 1, 1993 continue to be regulated by the law in effect prior to that date. Accordingly, where there has been a change, the relevant Louisiana Law will be cited in this section as it was designated prior to January 1, 1993.

exclusively presumed to exist in the eyes of the State. La.Civ.Code Arts. 3345, *et seq.*; *Phillips v. Parker*, 483 So.2d 972, 975 (La. 1986). This, the so-called "public records doctrine", both requires the inspection of the mortgage rolls to ascertain what encumbrances exist against a particular parcel of property, and at the same time, protects all persons in their reliance on the mortgage rolls. *Matter of De La Vergne*, 156 B.R. 773 (Bkrtcy.E.D.La. 1993). All persons are conclusively presumed to have notice of the existence of all mortgages recorded on the mortgage rolls. *Id.*

Respondents argued below that the Bankruptcy Court order somehow erased Petitioners' mortgage by operation of law. Respondents' argument appears to be that, because of the existence of the Bankruptcy Court order, which Respondents interpreted to be in their favor, they were thus conclusively entitled to ignore the State's mortgage recordation law and procedure, even to the point of passing title in a multi-million-dollar sale of real estate located in Louisiana in the face of a good and valid mortgage recorded against it, without getting the mortgage erased. To accept such an argument would constitute a usurpation of Louisiana's right to control the land within its borders, in clear violation of the Tenth Amendment. The Bankruptcy Court order did not purport to affect, by operation of law, Petitioners' mortgage on the rolls of Orleans Parish, nor could it have done so.

The Orleans Parish Recorder of Mortgages was not before the jurisdiction of the Bankruptcy Court. Louisiana law is clear that the Recorder of Mortgages is the *only* person who may officially erase a Louisiana mortgage. La.Civ.Code Arts. 3371-3385; 3386-3396; La.Rev.Stat. § 9:5251. The Record herein discloses that the Recorder

was not served with process and brought before the Bankruptcy Court. It is indeed axiomatic that, before any federal court may exercise personal jurisdiction over any person, the procedural requirement of service of process must be satisfied. *Omni Capital International v. Rudolf Wolf & Co., Ltd.*, 484 U.S. 97, 104, 108 S.Ct. 404, 409, 98 L.Ed.2d 415 (1987); *J. O. Alvarez, Inc. v. Rainbow Textiles, Inc.*, 168 F.R.D. 201, 202-203 (S.D.Tex. 1996). Without the presence of the Recorder of Mortgages, the Bankruptcy Court *could not* have ordered the erasure of Petitioners' mortgage.

Even if the Bankruptcy Court had followed the correct procedure and afforded all Petitioners due process through an adversary proceeding, the most that the Bankruptcy Court order gave Respondents was a personal right to enforce that order through the procedures provided by the State of Louisiana for the erasure of mortgages, as codified in La.Civ.Code Arts. 3371-3385. This is clear from the federal statutory scheme mandating the enforcement of federal judgments through the enforcement machinery of the state in which the judgment is to be enforced. *See, e.g.*, Fed.R.Civ.P. 69, *et seq.*; Fed.R.Bkrtcy.Proc. 7069, *et seq.*; *Matter of Kassuba*, 10 B.R. 309, 310 (S.D.Fla. 1981). While it is true that most of the federal rules and precedents concerning the enforcement of judgments deal with money judgments, the obligation to use the State procedure to enforce a judgment should have even more force with respect to the erasure of a mortgage on real property.[18]

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[18] Moreover, Fed.R.Bkrtcy.Proc. 7070, by its terms, applies *only* in adversary proceedings. It is undisputed that no such proceeding was held in the Bankruptcy Court, and no order contemplated by Rule 7070 was issued by the Bankruptcy Court.

When Regions Bank bought the subject property on June 17, 1986, or at the latest when the sale was confirmed by the Bankruptcy Court order on August 14, 1986, it became incumbent upon Regions Bank to follow the Louisiana procedure for the erasure of a mortgage. *See* Ralph Slovenko, *Treatise on Creditors' Rights Under Louisiana Civil Law*, Claitor's Pub. Div., at 773-798 (1968); *Matthews v. Guillot*, 544 So.2d 723 (La.App. 3rd Cir. 1989). It is undisputed that this was not done, and that, so far as the Record before this Court discloses, Respondents have completely ignored, and will continue to ignore, the State of Louisiana and its orderly procedure assuring proper recordation of real property interests. Respondents have done nothing to enforce the Bankruptcy Court order which they now claim to have been somehow self-enforcing by operation of law. In fact, Louisiana provides a sophisticated, detailed, and specific procedure for the erasure of a mortgage, by someone other than the mortgagee, who claims to have a legally cognizable right to have the mortgage erased.

By way of introduction to this State's procedure, La.Rev.Stat. § 9:5251 provides, in pertinent part, as follows:

> No conventional or judicial mortgage shall be cancelled, removed from the public records, or in any manner affected by any public or private sale of property subject thereto in any succession, liquidation, insolvency, receivership, bankruptcy, or partition proceeding. . . .

Louisiana Law also provides that a mortgage shall not be erased as the result of the discharge in bankruptcy of the mortgagor. *Socony Mobil Oil Co., Inc. v. Burdette*, 309 So.2d 655, 656-657 (La. 1975); *Ferguson v. Porter*, 359 So.2d 676 (La.App. 1st Cir. 1978). *See also Property Asset Management*

v. Pirogue Cove Apts., 693 So.2d 1217 (La.App. 4th Cir. 1997) (holding that a mortgage, as an accessory obligation, is enforceable, whether or not the mortgagor is personally responsible for the obligation the mortgage secures).

The principal effect of these provisions is that the holder of a personal judgment – which is the most that Respondents may be said to have had as against Petitioners – cannot simply present that judgment, *ex parte*, to the Recorder of Mortgages and compel the Recorder to erase the mortgage with no notice to the mortgagee. *See Cheleno v. Selby*, 538 So.2d 706, 707 (La.App. 4th Cir. 1989), *citing, People's Homestead & Savings Ass'n v. Worley*, 191 La. 453, 185 So. 880 (1939) ("Inscription of mortgage can only be erased by the consent of the parties or by a judgment decreeing such erasure.")[19] A personal judgment is not self-enforcing so as to affect property rights by operation of law; it may affect such rights only if and when it is actually enforced. Thus, the person seeking to erase a mortgage is mandated to invoke the procedures of La.Civ.Code Arts. 3371-3385.

Because of La.Rev.Stat. § 9:5251, the Recorder of Mortgages *may not* erase a mortgage on the strength of a bankruptcy order or sale alone. Thus, Respondents could not have enforced the Bankruptcy Court order by convoking a summary *mandamus* proceeding against the Recorder alone. At a minimum, erasure of the mortgage

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[19] In this light, this procedure may be seen to embody the legislative concern that the State of Louisiana make sure, in its own right, that the required due process has been afforded, before it erases the substantive property rights of a mortgagee.

would have required the convocation of an ordinary proceeding, naming as defendants both the Recorder and Petitioners (as mortgagees), and relying on the determination of rights by the Bankruptcy Court order, as between Petitioners and Respondents. This would have accomplished at least two necessary objectives: First, because the Recorder would have been brought before the Court, such a proceeding could have resulted in a personal judgment against the Recorder ordering him – as the only person who can do so under Louisiana law – to erase the mortgage. Second, in such an ordinary proceeding, Petitioners would have undeniably received notice of the potential cancellation of their property rights, and would have been able to present any defenses they may have had to the enforcement of the Bankruptcy Court order, *e.g.*, that the Bankruptcy Court did not hold an adversary proceeding and did not afford all Petitioners the required *Mennonite* notice. *See Federal Savings & Loan Ins. Corp. v. Tri-Parish Ventures, Ltd.*, 881 F.2d 181, 182-184 (5th Cir. 1989).

Finally, it is undisputed herein that Respondents took no steps whatsoever to enforce any rights they may have had under the Bankruptcy Court order. It is also undisputed that: (1) the mortgage remained duly recorded at the time of the sale in question; (2) the mortgage was re-inscribed by the Recorder of Mortgages after the sale; and (3) the mortgage remains duly recorded to this day. Respondents' right to invoke the erasure procedure of the State of Louisiana accrued no later than August of 1986. Louisiana law also provides that the right to invoke this procedure prescribes in ten years. La.Civ.Code Art. 3499 (formerly Art. 3544); Yiannopolis, *Civil Law Property*, 3rd Ed., § 250 at 488 (West 1991). Moreover, it is clear as a

matter of federal law that the right to enforce a federal judgment may not extend beyond the time provided by the law of the state in which the judgment is to be enforced. *See United States v. Fiorella*, 869 F.2d 1425, 1426 (11th Cir. 1989).

Thus, after August of 1996, neither Regions Bank, nor FSA as its successor in interest, had any right to erase the mortgage, and this is true as a matter of Louisiana law, regardless of any right that Regions Bank may or may not have had in August of 1986. Regions Bank and its successors lost any rights they may have had by their evident choice not to avail themselves of those rights. If the position adopted herein by Regions Bank is ultimately sustained, it would mean that the mortgage could in theory remain recorded against the property forever, and only those with whom Regions Bank or FSA deign to share knowledge of the Bankruptcy Court order would be aware that the mortgage really does not exist. This selectively enlightened group would apparently not include the Recorder of Mortgages of Orleans Parish or any other official of the State of Louisiana. *See Amoskeag Bank v. Chagnon*, 133 N.H. 11, 572 A.2d 1153 (1990) (discussing the necessity to maintain the integrity of the public records). To sustain Respondents position would effectively create a federal property court and a federally supervised mortgage recordation system. Such a result would constitute an unwarranted intrusion against the sovereign right of a state to control the real property within its borders.

CONCLUSION

For the reasons assigned above, the opinion of the United States Court of Appeals for the Fifth Circuit in *Rivet v. Regions Bank of Louisiana*, 108 F.3d 576 (5th Cir. 1997), should be reversed, and this civil action should be ordered to be remanded to the Civil District Court for the Parish of Orleans, State of Louisiana.

Respectfully submitted,

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